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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 561

T. ROLAND BERNER and ARTHUR S. LESSER, Executors of The Estate of WILLIAM KAPELL, deceased,

Petitioners,

v.

BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., a Foreign Corp., and BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., now doing business as QANTAS EMPIRE AVIATION, LTD., a Foreign Corp.,

Respondents.

PETITION ~~AND REQUEST FOR REHEARING OF A PETITION~~ FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
The Statute and Rule	2
Statement	3
Reasons for Granting the ~~Writ and Rehearing of Plaintiffs~~' Petition for Writ	4
1. Justice requires that defendant's admission of liability for $8,300 before three separate juries be judicially binding and requires a reversal of costs taxed against plaintiffs in the amount of $7,741.25; plaintiffs further request rehearing of their petition for certiorari because of defendants' counsel's flagrant violation of Rule 11 of the Federal Rules of Civil Procedure, which was prejudicial to plaintiffs	4
2. Defendant, without bringing the problem of security on appeal to the attention of the court, voluntarily paid a premium on a supersedeas bond which was under the circumstances unnecessary	6
3. The Court of Appeals correctly held that "defendants obtained the daily transcript for their convenience" but inconsistently and erroneously held that it was "necessarily obtained for use in the case." 28 U.S.C. § 1920(2)	8
Conclusion	8

PAGE

APPENDIX A—Opinion of Court of Appeals 9

APPENDIX B—Order of Court of Appeals, dated and Entered June 20, 1966 12

APPENDIX C—Federal Rules of Civil Procedure—Rule 11 13

CITATIONS

Cases:

Farmer v. *Arabian American Oil Co.*, 379 U. S. 227 ..... 1, 6

Statute:

28 U.S.C. § 1920(2) 2, 8

Rule

Federal Rules of Civil Procedure
Rule 11 5
Rule 54(d) 3

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Opinions Below

The opinion of the Court of Appeals, printed in Appendix A at the end of this Petition, is reported in 362 F. 2d 799-801 (C. A. 2).*

* Two of the three judges on the panel in this case (Lumbard, Ch. J. and Moore, J.) were in the majority of the *en banc* panel in *Farmer* v. *Arabian American Oil Company*, 324 F. 2d 359 (C. A. 2) which was reversed by this Court, 379 U. S. 227. The Second Circuit did not follow the national policy set forth in *Farmer*.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on June 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

Questions Presented

1. Where defendant admits liability of $8,300, before three separate juries, including the jury in the case at bar, is that admission not judicially binding and does it not require a reversal of costs taxed against plaintiffs in the amount of $7,741.25?

2. When a defendant fails to bring to the Court's attention its need to obtain a stay of execution of a judgment in the amount of $924,396.00, where it has more than adequate assets within the jurisdiction, and instead "went ahead and piled up" this huge bill of costs for a supersedeas bond, was it not an abuse of discretion to allow as taxable costs such an expense not specially allowed by statute?

3. When a defendant purchases a transcript for his own "convenience", which only later becomes necessary for post-trial motions, was it "necessarily obtained for use in the case" as required by 28 U.S.C. § 1920(2)?

The Statute and Rule

28 U.S.C. § 1920(2) concerned with costs, provides in pertinent part as follows:

> "A judge or clerk of any court of the United States may tax as costs the following:
>
> • • • • •
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case . . ."

Rule 54(d) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . ."

Statement

The District Court taxed costs against plaintiffs for the following items, contested herein:

Fees of the court reporter for the transcript	$1,299.35
Cost of supersedeas bond	3,828.55

The Court of Appeals affirmed the District Court's taxation of costs, 362 F. 2d 799 (C. A. 2) and also refused to reconsider the costs of the appeal taxed against plaintiffs in the amount of $2,428.75.

This action was brought for the wrongful death of William Kapell, famed pianist, on behalf of his widow and two children. Mr. Kapell, age 31, was killed when defendant BCPA's airplane crashed into a mountain near San Francisco Airport in 1953. Said flight was engaged in international transportation and was thereby governed by the Warsaw Convention. At a trial before Judge Ritter, in the Southern District of New York the jury returned a verdict for the defendants and thereby failed to award plaintiffs the $8,300.00 set out in the Convention.

The Trial Court granted plaintiffs' motion for a judgment n.o.v. on the issue of liability, to wit, wilful misconduct, and ordered a new trial on the issue of damages, and also provided for a new trial on all issues in the event the judgment n.o.v. was reversed on appeal. 230 F. Supp. 240 (S.D.N.Y.). On the new trial on damages, a jury

awarded plaintiffs $924,396.00. The Court of Appeals reversed the judgment n.o.v. on the issue of liability and also reversed the order for a new trial. 346 F. 2d 532 (C. A. 2). Judgment was entered thereon on June 9, 1965, upon the jury's verdict in favor of defendants. Plaintiffs' petition for rehearing was denied. Plaintiffs' petition for a writ of certiorari was denied on January 17, 1966.

Reasons for Granting the ~~Writ and Rehearing of Plaintiffs~~' Petition for Writ

1. Justice requires that defendants' admission of liability for $8,300 before three separate juries be judicially binding and requires a reversal of costs taxed against plaintiffs in the amount of $7,741.25; plaintiffs further request ~~rehearing~~ of its petition for certiorari because of defendants' counsel's flagrant violation of Rule 11 of the Federal Rules of Civil Procedure, which was prejudicial to plaintiffs.

In a different case, arising out of this same crash, tried in California, defendants' counsel, on summation (January 21, 1959) admitted that they had not sustained their burden on the issue of defendants' liability for $8,300.00.* After the jury returned a verdict for the defendant, the District Court ordered a new trial on all issues. Before the second jury, defendants' counsel, on summation (March 5, 1959), again requested the jury to award plaintiffs

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* Mr. Parker for defendants (S.M. 949):

"Now, under the Warsaw, there is absolute liability unless the defendants can come in and show in effect there was no negligence. What they have to show, in the words of the convention, is they took all necessary measures to avoid the loss. Let me submit to you ladies and gentlemen, we can't prove that we were free from negligence."

$8,300.00;* the jury actually awarded $35,000 which was in excess of the limited liability in the Convention.

Thereafter in the summation in the case at bar (March 30, 1961) Mr. Parker, as counsel for defendants, again admitted that defendants had not sustained their burden of proof on the issue of liability for $8,300.**

However, in the middle of all of these concessions, defendants filed their answer in this case (dated February 3, 1959), wherein defendants took the *opposite and inconsistent* position and contended that they took "all necessary measures to avoid the damage claimed by plaintiffs. . . ."

The above stated history constitutes a flagrant violation of Rule 11 of the Federal Rules of Civil Procedure, to wit, that counsel certify as to the pleading "that to the best of his knowledge, information, and belief there is good ground to support it. . . ." There was plainly no ground to support the answer herein denying liability as to the $8,300 when counsel for defendants in summation at three trials, both before and after the answer was filed, conceded the very liability they denied in their answer.

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* Mr. Parker for defendants (S. M. 1137):

> "Going up to the ceiling, by our federal law of $8,300, and I respectfully submit to you ladies and gentlemen *you should go that in this case,* that we cannot prove by fair preponderence of the evidence that we were free from negligence . . .";

Concerning separate plaintiffs in the same suit, Mr. Parker stated (S.M. 1130):

> ". . . I will invite the Court to give a direct verdict in behalf of the plaintiffs up to the limit of the Warsaw Convention."

** Mr. Parker for the defendants (S. M. 1821):

> "We have to prove, by a preponderance of the evidence, that the airline took every measure to avoid the loss, or that it was impossible for them to take such measure. In all fairness, we certainly have not sustained that burden of proof. We haven't brought in any evidence to show."

By its failure to have good ground to support its answer, defendants, for the purpose of trial tactics, converted an admitted liability of $8,300 into a contested issue for the jury; all to plaintiffs' prejudice—witness a zero verdict and costs taxed against plaintiffs. Defendants' conduct and that of its counsel make a "successful game" out of justice, regardless of the truth of the matter.

Plaintiffs therefore submit that defendants have trifled with our system of justice, thus far with impunity.

Of what purpose the rules, if counsel are rewarded by flagrant, bad-faith breaches thereof; greater violations are encouraged. Perhaps one of the greatest contributing causes to congested calendars is counsel's failure to accurately certify the facts to the court after investigation. Under the circumstances, since the pleading was signed "with intent to defeat the purpose of this rule", then it should "be stricken as sham and false and the action may proceed as though the pleading had not been served".

Justice dictates that defendants should not have the benefit of their own wrong; plaintiffs' petition ~~for rehearing of its petition~~ for a writ of certiorari should be granted.

2. Defendant, without bringing the problem of security on appeal to the attention of the Court, voluntarily paid a premium on a supersedeas bond which was under the circumstances unnecessary.

Farmer v. *Arabian American Oil Co.*, 379 U. S. 227, 325, flatly held:

> "the discretion given district judges to tax costs should be *sparingly exercised* with reference to expenses *not specifically allowed* by statute."

The Court of Appeals purported to recognize the admonition of *Farmer* but ignored it by holding "Such a bond, ordinary and *necessary* to stay execution during

an appeal, has long been held a proper item of costs" even though it was not statutory. The underlying issue is, "was the bond necessary?" Plaintiffs submit that the defendants should have first sought a stay of execution from the Court since one of the defendants had, and still has, Boeing 707 planes flying into New York on a regularly scheduled basis and each airplane costing over $6,000,000 would be adequate security. Furthermore, in order to obtain this bond, defendants posted as security an irrevocable letter of credit with the bonding company,* which could have easily been part of that stay. The simple fact is that before making this unnecessary expenditure for a bond premium, counsel for defendants should have applied to the Court for a stay of execution. The Court of Appeals erroneously placed the burden on plaintiffs and held "Plaintiffs *never objected* to this method of staying execution on the judgment . . ." But in *Farmer,* this Court held that the party making the expenditure "should bring (the) problem to the Court's attention" (235).

In *Farmer,* this Court also held (235):

> "We do not read that Rule [54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. *Items proposed by winning parties as costs should always be given careful scrutiny.* Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be. * * * *Such a restrained administration of the Rule is in harmony with our national policy of reducing insofar as possible the burdensome cost of litigation.*"

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* Defendants' counsel admitted such to counsel for plaintiffs.

The decision below deviated sharply from that national policy.

3. The Court of Appeals correctly held that "defendants obtained the daily transcript for their convenience" but inconsistently and erroneously held that it was "necessarily obtained for use in the case." 28 U.S.C. § 1920(2).

Once defendant purchased the transcript for its own convenience, no part of it should have been taxed even though it *later* became necessary for post-trial motions. The Court's speculation that the defendants "could anticipate that they would later need" the transcript is immaterial. The governing standard is present necessity not present convenience or future necessity.

The Court below notwithstanding *Farmer*, failed to apply to the facts here "our national policy to minimize the cost of litigation".

CONCLUSION

For the foregoing reasons, this petition ~~and request for a rehearing of a petition~~ for a writ of certiorari should be granted.

Respectfully submitted,

T. ROLAND BERNER,
Attorney for Petitioners.

Of Counsel:

M. VICTOR LEVENTRITT,
AARON LEWITTES,
SIDNEY BENDER.

September 15, 1966.

APPENDIX A

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 356—September Term, 1965.

(Argued May 3, 1966 Decided June 20, 1966.)

Docket No. 30162

T. ROLAND BERNER and ARTHUR S. LESSER, Executors of the Estate of WILLIAM KAPELL, deceased,

Plaintiffs-Appellants,

—v.—

BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., a Foreign Corp. and BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., now doing business as QANTAS EMPIRE AVIATION, LTD., a Foreign Corporation,

Defendants-Respondents.

Before:

LUMBARD, *Chief Judge,*
MOORE and FEINBERG, *Circuit Judges.*

PER CURIAM:

Plaintiffs appeal from a judgment entered in the District Court for the Southern District of New York taxing them for costs in favor of defendants for $5,312.50. Plaintiffs also request reconsideration and reversal of the tax-

ation of $2,428.75 as costs entered by this court against them as the losing party upon a previous appeal. We find that the district court did not abuse its discretion in charging these costs to the losing party and we therefore affirm.

The plaintiffs had brought suit for wrongful death on behalf of the widow and children of the noted pianist William Kapell who was killed in an airplane crash in 1953. After a jury verdict for the defendants, Judge Ritter, sitting by designation, granted judgment n.o.v. for the plaintiffs. At the new trial on the issue of damages, a jury awarded plaintiffs $924,396. This court reversed the judgment n.o.v., 346 F. 2d 532 (1965), and judgment accordingly was entered in favor of defendants. Pursuants to that decision, the costs of the appeal were taxed to the losing plaintiffs-appellees in the amount of $2,428.75. We decline to reconsider the propriety of the amount so taxed.

The clerk of the district court taxed the plaintiffs $5,672.70 for fees, costs of the transcript, costs incident to the taking of depositions, and the costs of a supersedeas bond. Upon review, Judge McLean disallowed the costs incident to the taking of depositions and confirmed the balance of the charges which total $5,312.50.

Appellants claim that the charge for the transcript of the trial was improper because the transcript was not "necessarily obtained for use in the case" as required by 28 U. S. C. § 1920(2), and that the posting of the supersedeas bond to stay the execution of the large judgment during appeal was unnecessary.

Although defendants obtained the daily transcript for their "convenience," the amount charged was the basic prevailing rate and does not include the extra "daily" copy charge. It is conceded that it later became necessary to have the 2,000-page transcript for purposes of post-trial motions and for appeal. Plaintiffs suggest that because defendants did not wait to order the transcript, which they

could anticipate they would later need, the cost thereof was not necessary; we find this contention frivolous.

Nor can we agree with the contention that the admonition of the Supreme Court in *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227, 235 (1964), that lower courts should tax nonstatutory costs sparingly requires disallowance of the taxation for a supersedeas bond. Such a bond, ordinary and necessary to stay execution during an appeal, has long been held a proper item of costs. *Land Oberoesterreich* v. *Gude*, 93 F. 2d 292 (2 Cir.), cert. denied, 300 U. S. 663 (1937). Plaintiffs never objected to this method of staying execution on the judgment, and the suggestion that some method of attachment on the defendants' airplanes was an available substitute is an afterthought wholly without merit.

Finally, plaintiffs argue that such heavy charges should not be imposed upon the widow and children for whom this action was brought in good faith. This is a matter reserved to the sound discretion of the trial judge, *Farmer* v. *Arabian American Oil Co., supra*, 379 U. S. at 232-33, and we find no basis for concluding that the trial judge abused that discretion.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of June one thousand nine hundred and sixty-six.

Present: HON. J. EDWARD LUMBARD, Chief Judge,
HON. LEONARD P. MOORE,
HON. WILFRED FEINBERG, Circuit Judges

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

RULES OF CIVIL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

* * * *

Rule 11.

Signing of Pleadings.

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name . . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action.